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No. 82-167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, et al.,

Petitioners,

v.

VERNON WALLACE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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Butler, Inequality in the Military: An Examination of Promotion Time for Black and White Enlisted Men, 41 Am. Soc. Rev. 807 (1976)..... 11

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Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 M.I.L. Rev. 1 (1975)..... 19

Perry, An American Dilemma at Sea: Race and Incarceration in the Naval Justice System, 41 Phylon 50 (1980)... 11

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Quinn, The United States Court of Military Appeals and Military Due Process, 35 St. John's L. Rev. 225 (1961)..... 17

Recruiting Circular Letter No. 86-42 (May 18, 1942), reprinted in, VI Blacks in the United States Armed Forces -- Basic Documents 116 (M. McGregor & B. Nalty ed. 1977)..... 6

Reddick, The Negro in the Navy in World War II, 32 J. of Negro Hist. 201 (1947)..... 40, 41

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Stillman, Negroes in the Armed Forces, 30 Phylon 139 (1969)..... 8, 10

U.S. Dep't of Defense, Defense 81, Special Alamanac Issue (Sept. 1981)... 7, 8, 11

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS AMICUS CURIAE

INTEREST OF AMICUS*

The NAACP Legal Defense and Educational Fund, Inc., ("LDF") is a non-profit corpora-

* Letters of consent to the filing of this brief from counsel for the petitioner and the respondent have been filed with the Clerk of the Court.

tion incorporated under the laws of the State of New York in 1939. It was formed to assist blacks to secure their constitutional rights by the prosecution of lawsuits. LDF attorneys have represented parties and participated as amicus curiae in this Court and other courts in a broad range of cases involving the rights of black citizens. LDF attorneys have, historically, been active in protecting the rights of black servicemen and, recently, participated as amicus curiae in the Court of Military Appeals. United States v. Matthews, Dkt. No. 43538/AR, CM 439064.

STATEMENT OF FACTS

Respondents are five black Navy enlisted men who were subjected to an unrelenting pattern of systemic racial discrimination on board their vessel, the U.S.S.

Decatur. Their commanding officer systematically assigned them to the most menial of tasks [Complaint ¶ 12]; gave them adverse and unwarranted performance ratings [Complaint ¶¶ 19-22, 53, 113, 114]; denied them opportunities for advancement and training, which were instead offered to white sailors with less seniority and fewer qualifications [Complaint ¶¶ 53, 74, 75, 93, 94]; subjected them to intimidating, degrading and humiliating threats [Complaint ¶¶ 111, 112]; and unjustly disciplined them [Complaint ¶¶ 52, 114].

Respondents initially sought redress through existing naval channels. But their pleas for redress fell upon deaf ears.[1/]

1/ The court of appeals found that respondents had alleged exhaustion of administrative remedies and accordingly remanded to the trial court for a factual determination on this matter. 661 F.2d at 731 n.2.

[footnote continued]

Respondents then turned to the only avenue of redress open to them. They filed a Bivens action seeking compensatory and punitive damages for the violations of their fifth amendment rights.

The government's argument that respondents should be denied a remedy must be viewed against the background of pervasive and persistent racial discrimination in the military. See Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 267 (1977). Although the meritorious service of blacks in the Navy dates to the Revolutionary War,[2/] in modern times, blacks have

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[footnote continued]

Because this case is here on a motion to dismiss, all of the allegations must be taken as true. Scheuer v. Rhodes, 416 U.S. 232, 236(1974).

2/ Mueller, The Negro in the Navy, 24 Social Forces 110 (1945); Bureau of Naval

[footnote continued]

served primarily as messmen and stewards.[3/] At the beginning of World War II, blacks constituted only 2.9% of the Navy, and there were only 6 blacks on active duty who were not messmen.[4/]

The Navy eventually yielded under presidential pressure and announced on April 7, 1942 that it would accept blacks

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[footnote continued]

Personnel, The Negro in the Navy 1 ("Naval Personnel"), reprinted in VI Blacks in the United States Armed Forces: Basic Documents, 305, 309 (M. McGregor & B. Nalty ed. 1977) ("McGregor & Nalty").

3/ Naval Personnel, supra, at 1 reprinted in McGregor & Nalty, supra, at 309. In this regard, it is striking to note that three of the five respondents here, Cornelius Hickey, James Richardson, and George Shannon, all had ratings as messmen.

4/ Naval Personnel, supra, 1-2, reprinted in McGregor & Nalty, supra, at 309-10.

for "general service" in "[a]ll ratings."[5/] But it did not do so. Rear Admiral Jacobs, Chief of Naval Personnel, decreed that: "Apprentice seaman is the only rating in which negroes may be enlisted except those messman ratings previously authorized."[6/] Additional presidential pressure -- applied after

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5/ Dep't of Navy News Release (Apr. 7, 1942), reprinted in McGregor & Nalty, supra, at 103. In rejecting the President's first proposal, that the Navy accept 5,000 blacks, a Marine general noted that "the negro race has every opportunity now to satisfy its aspirations for combat, in the Army -- a very much larger organization than the Navy or Marine Corps, -- and their desire to enter the naval service is largely, I think, to break into a club that doesn't want them." Hearings Before the General Board of the Navy 1942, reprinted in McGregor & Nalty, supra, at 49.

6/ Recruiting Circular Letter No. 86-42 (May 18, 1942), reprinted in McGregor & Nalty, supra, at 116.

noting the Navy's dismal record as compared with the Army[7/] -- forced the Navy to make some short-lived progress; it integrated auxiliary vessels toward the end of the war. But the Navy reverted to its prior pattern by 1947. At that time, only 4.4% of the Navy was black, and 80% of the blacks were serving as cooks, stewards or stewards mates. Less than 2% of the whites served in the same capacities. In contrast, the Army was 8.2% black, 9% of which were in the top

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7/ In a memorandum for the Secretary of the Navy, President Roosevelt noted that the Army had met his directive that blacks be used in proportion to their numbers in the general population, "but the Navy is so far below...." reprinted in McGregor & Nalty, supra, at 130-131. At the time, the figure was 10%. While the Army met this goal in a matter of months, the Navy took 38 years to do so; it did not reach the 10% goal until 1980. U.S. Dep't of Defense, Defense 81, Special Almanac Issue 21, 26 (Sept. 1981) (Navy was 9.7% black in Sept. 1979; 10.4% in Sept. 1980). By then the Army stood at 29.6% black. Id.

three grades. Report of the President's Commission on Civil Rights, To Secure These Rights 42, 45 (1948) ("Civil Rights Report"). This same pattern remains true today; the Navy recruits fewer blacks than any other service.[8/]

8/ See n.7 supra, and n.12 infra. Between 1949 and 1965 the percentages of blacks increased from 12.4 to 13.4% in the Army, 5.1 to 10.0% in the Air Force, 2.1 to 8.7% in the Marine Corps, and only 4.7 to 5.8% in the Navy. Stillman, Negroes in the Armed Forces, 30 Phylon 139, 143 (1969). Similarly, while the Army and the Air Force had 7,622 and 3,106 cadets each in ROTC units at 15 major black colleges in 1964-65, there were no Navy ROTC programs at black schools. Id. at 145. Of course, the same pattern held true for non-commissioned officers. Between 1953 and 1965, the number of black non-commissioned officers in the Army rose from 14.7 to 16.3%, and from 11.1 to 13.1% in the Air Force and from 8 to 8.4% in the Marines. In contrast, the Navy only increased from 4.3 to 5.8%. Id.

The Navy's record in promoting blacks to officer rank is no better. Under pressure to promote blacks to officer,[9] the Bureau of Naval Personnel could only bring itself to concur on the following basis:

> However unpalatable the idea may be, it is believed certain that ... the Navy will be required to do so.... If the Navy prepares a limited program there is much less danger that it will be required to take much greater numbers of [black] officers on any certain percental [sic] basis.[10]

By 1947, there was still no black officer with a regular commission. Granger, Racial Democracy -- The Navy Way, 7 Common Ground

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9/ Undersecretary Adlai E. Stevenson observed that "one reason we have not had the best of the race is the suspicion of discrimination in the Navy." Memorandum (Sept. 29, 1943), reprinted in, McGregor & Nalty, supra, at 141.

10/ Memorandum for the Chief of Naval Personnel, reprinted in, McGregor & Nalty, supra, at 142.

61, 67 (1947). In 1948, there were but two black naval officers amongst 21,793 black enlisted men; while in contrast, there was one white officer for every seven white sailors. Similarly, the Coast Guard and the Marines had one and zero black officers respectively. This was an even worse record than the Army's, which had one black officer for every 70 black enlisted men, compared to a one to seven ratio for whites.[11/]

Although the advent of the all volunteer forces of the 1970's has increased black

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11/ Civil Rights Report at 42, 45. The persistence of this pattern is further evidenced by the fact that by 1965 the percentage of black officers in the Navy had only reached 0.3%. Stillman, supra, at 143.

participation in most of the military,[12] the available data shows the persistence of discrimination in promotions, job assignments and discipline.[13] Indeed, one scholar concluded that "it appears that being white in the Army is more important than doing well...."[14]

12/ As of September 30, 1980, 29.6% of the Army was black. U.S. Dep't of Defense, Defense 81, Special Almanac Issue (Sept. 1981). Similarly, blacks constituted 20.6% of the Marine Corps, and 14.1% of the Air Force, but only 10.4% of the Navy. Id.

13/ Butler, Inequality in the Military: An Examination of Promotion Time for Black and White Enlisted Men, 41 Am. Soc. Rev. 807, 817 (1976); See Butler, Assessing Black Participation in the Army, 23 Social Problems 558, 565, (1976); Miller and Ransford, Inequality in the Military: Implications for Organizations, Occupational Mobility and Social Stratification, 6 J. of Political & Military Soc. 65, 68 (1978); Segal and Nordlie, Racial Inequality in Army Promotions, 7 J. of Political & Military Soc. 135 (1979); Perry, An American Dilemma at Sea: Race and Incarceration in the Naval Justice System, 41 Phylon 50, 56 (1980) .

14/ Butler, supra, 41 Am. Soc. Rev. at 817.

In sum, the American military has been plagued with entrenched and enduring racial discrimination. And the Navy has been, and continues to be, the greatest offender.

SUMMARY OF ARGUMENT

The government's argument that the action of military officers should not be reviewable by civilian courts goes beyond the grant of certiorari and the long line of cases in this Court holding the actions of the military, like other departments of the government, to the commands of the Constitution. It ignores the congressional scheme which emphasizes the accountability of the military to civilian authority. It ignores the fact that the military is particularly unsuited to evaluate constitutional claims of service members and that the Court has already upheld the availability of a damage

action against military officers in a case involving the eighth amendment.

The demands of military discipline are adequately protected by the broad qualified immunity available to government officials under Harlow v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 396 (1982). The government would have the Court create a new absolute immunity for military officers that has no foundation either in common law precedent or constitutional heritage or structure. In over a century and a half of legislation dealing with suits against military and other government officers, Congress has consistently declined to provide absolute immunity to military officers other than medical personnel.

Servicemen have a cause of action directly under the fifth amendment for racial discrimination. There are no special

factors counseling hesitation. The concerns articulated by the government are already protected by the broad Harlow immunity. Congress has given no indication that the internal procedures available to servicemen were intended to be exclusive substitutes for a Bivens cause of action. The internal military procedures are not as effective; they do not provide full compensatory or punitive damages or adequate deterrence to would be wrongdoers. Indeed, absent a Bivens remedy, a serviceman would have no effective remedy for violations of clear cut constitutional rights, such as the right to be free of racial discrimination.

ARGUMENT

I.

THE MILITARY IS NOT AN EXTRA-CONSTITUTIONAL BRANCH OF GOVERNMENT

A. Like Every Other Department of Government, the Military is Subject to the Rule of Law

Under the government's argument, no matter how much extra-constitutional power a military officer arrogates to himself, and no matter how seriously he infringes the basic constitutional rights of another serviceman, his actions would be unreviewable in a "civilian" court.[15/] The only relief

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15/ Despite the limited grant of certiorari to the question of the availability of a damage action, the government's position is that "civilian" courts can never take cognizance of a serviceman's allegation of a constitutional violation by a military officer because review by civilian courts is disruptive of the military system. Brief for Petitioners at 26-29. The logic of the government's position would bar even injuctive relief against blatant constitutional violations.

available to the serviceman would be that provided by the internal military structure itself.

The entire thrust of the government's argument that the military should be removed from the realm of the constitutional process is the demand of military necessity. But the Court has accommodated the special needs of the military while retaining the basic structure of the Constitution. In these circumstances, the special nature of military service can be met by granting military officers qualified immunity under Harlow v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 396 (1982), and by sensitively applying the commands of the Constitution to the military context. The government's position of absolute unaccountability, however, "would be contrary to the basic concept of separation

of powers and the checks and balances that flow from the scheme of a tripartite government," United States v. Nixon, 418 U.S. 683, 704-705 (1974), (citing The Federalist, No. 47, at 313 (S. Mittel ed. 1938)). See also Duncan v. Kahanamoky, 327 U.S. 304, 322-23 (1946).

By explicitly exempting the military from the grand jury requirement of the fifth amendment, the drafters made clear that the military is otherwise bound by the amendment.[16/] This Court has repeatedly declined to allow "military necessity" to override the basic rule of law. E.g., Duncan, 327 U.S. at 322-323. "[E]ven the war power does not remove constitutional limitations safe-

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16/ See Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 188-89, 193 (1962); Quinn, The United States Court of Military Appeals and Military Due Process, 35 St. John's L. Rev. 225 (1961).

guarding essential liberties." United States v. Robel, 389 U.S. 258, 263-264 (1967); see Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156 (1919); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); see also United States v. United States District Court, 407 U.S. 297, 320 (1972). The courts have traditionally been available to vindicate the constitutional rights of service members.[17/] Contrary to the government's assertion, in the area of habeas

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17/ See, e.g., Brown v. Glines, 444 U.S. 348 (1980) (first amendment); Parker v. Levy, 417 U.S. 733 (1974) (due process-vagueness); Frontiero v. Richardson, 411 U.S. 677 (1973) (equal protection); Parisi v. Davidson, 405 U.S. 34 (1972); Burns v. Wilson, 346 U.S. 137, 142 (1953) (due process); cf. Rostker v. Goldberg, 453 U.S. 57 (1981) (equal protection challenge to military registration system); Harmon v. Brucker, 355 U.S. 579, 581-82 (1958) (challenge to less than honorable discharge: "judicial

(footnote continued)

corpus review of convictions for constitutional error, the standard of review for courts-martial is the same as that for state court judgments. Compare Burns v. Wilson, 346 U.S. 137 (1953), with Stone v. Powell, 429 U.S. 874 (1976).

On the other hand, the lack of expertise on the part of the military to evaluate constitutional claims of service members has often been recognized.[18/]

(footnote continued)

relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers"). High level military officers in the Judge Advocate General's Corps have themselves recognized that the military will be held accountable to the Constitution. Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 M.I.L. Rev. 1(1975).

18/ Noyd v. Bond, 395 U.S. 683, 696 n.8 (1969); McElroy v. United States, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957); Toth v. Quarles, 350 U.S. 11 (1955).

Indeed, the Court has already sustained the availability of a damage remedy against a military officer who had abused the rights of a serviceman. Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849) ("Wilkes I"); Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851)("Wilkes II"), see discussion, infra, at 29, 36-37. The Wilkes court specifically refused to extend absolute immunity to military commanders: "[t]he humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office." 48 U.S. at 123.

B. Military Necessity Does Not Require Unaccountability to Civilian Authority

The qualified immunity articulated in Harlow, affords officials sufficient "breathing room" to make necessary decisions; it even allows room for errors of judgment.

Harlow protects government officials from liability except for violations of clear-cut constitutional rights. Rather than "second-guessing" military commands, civilian courts would only be correcting clearly unconstitutional conduct.

Moreover, civilian courts have repeatedly displayed their sensitivity to the specialized needs of the military. The decisions of this Court bear witness to the ability of civilian courts to appreciate those needs and to shape constitutional doctrine to fit the military context.[19/]

Ultimate responsibility to civilian authority is the principle which Congress has consistently adopted in this area. So

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19/ See, e.g., Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding draft registration of males); Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974).

pervasive is the notion of civilian control that, when Congress created a military court system for courts-martial, it staffed the highest appellate court of that system, the United States Court of Military Appeals, with civilian judges. 10 U.S.C. §867(a)(1). It did so even though it was presented with the same argument now put forth by the government -- that only those intimately acquainted with the special needs and mores of military life could sit in judgment of service members. See 96 Cong. Rec. 1305-1306. Civilians review military actions and decisions in other contexts as well.[20/]

20/ See, e.g., Harmon v. Brucker, 355 U.S. 579 (1958) (propriety of less than honorable discharge subject to judicial review); 10 U.S.C. § 1552 (Board for Correction of Military Records composed of civilians).

C. The Military is Ill-Suited to Police Racial Discrimination Within its Ranks

The history of the military, particularly the Navy, in dealing with black servicemen is instructive. When the President directed the naval hierarchy to increase black enlistments, it resisted. Senior naval officers deemed it contrary to "the best interests of general ship efficiency" and "the national defense" to allow blacks to serve in other than the messman branch.[21/] That senior military officials could perceive even minimal steps toward equal treatment as a threat to national security demonstrates the unsuitability of entrusting enforcement of basic constitutional provisions to those whose perceptions are shaped largely by the

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21/ Memorandum From the Chief of the Bureau of Navigation to the Chief of Naval Operations, October 24, 1941, reprinted in McGregor & Nalty, supra, at 11.

exigencies of the moment. Officials need not be corrupt or morally bankrupt in order to disregard express and fundamental constitutional requirements; they need only have their vision narrowed by their immediate concerns. Enforcement of fundamental principles must thus be entrusted to institutions and individuals better situated to obtain a wider perspective.

In sum, the government's claim would exempt the military from Article III review and make it unaccountable for violations of the fundamental constitutional rights of servicemen. The government is thus correct that there is a separation of powers issue here. It is, however, not that the judiciary threatens to undermine the military "branch," but that the military wants to opt out of our system of checks and balances to

avoid an "inefficient" concern for constitutional rights. If military officers are unaccountable in a civil court for civil rights violations, then the parade of horrors is endless because it makes large-scale, systematic violations of civil rights possible.

II.

MILITARY OFFICIALS ARE ENTITLED TO QUALIFIED AND NOT ABSOLUTE IMMUNITY

The government argues for absolute immunity to protect the vigorous exercise of official authority. This ignores the framework established by this Court for balancing this interest with the vindication of constitutional guarantees. Harlow, 73 L.Ed.2d at 403-04, 407-08. It also ignores the fact that Congress has consistently declined to immunize military officers.

A. This Court Should not Legislate Absolute Immunity for Military Officers When Congress has Consistently Declined to Do So

The Constitution gives Congress primary power and responsibility for the governance of the military. Article I, Section 8 empowers Congress "[t]o declare War," Cl. 11, "[t]o raise and support Armies," Cl. 12, "[t]o provide and maintain a Navy," Cl. 13, "[t]o make Rules for the Government and Regulation of the land and naval Forces," Cl. 14, "[t]o provide for calling forth the Militia to execute the Laws of the Union," Cl. 15, and "[t]o provide for organizing, arming, and disciplining, the Militia...." Cl. 16. Congress's power over the armed forces extends to every aspect, and explicitly includes discipline. It is for Congress in the first instance, then, to determine if disciplinary needs require

legislation granting officers absolute immunity from damage suits by servicemen.[22/]

Over two centuries, Congress has repeatedly addressed the question of the liability of officers for damages. Rather than providing for absolute immunity, it has

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22/ The Court is not now faced with the issue of balancing a declaration by Congress that certain military officers are absolutely immune from damages against anv particular civil rights violation, such as race discrimination. Even in that instance, the Court should not abdicate its responsibility to review issues involving the military, but would have to balance Congress's special and explicit Article I power with the Court's Article III power to enforce the Bill of Rights. The Court, however, is being asked to create a conflict by legislating an absolute immunity where Congress has consistently declined to shield the military from the dictates of the Bill of Rights.

traditionally provided for removal to a federal court.[23/] When Congress passed the removal statutes, military officers were subject to liability even though their actions were strictly in compliance with orders from a superior officer, including

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23/ Motivated by New England's resistence to the War of 1812, Congress passed the Act of February 4, 1815, § 8, 3 Stat. 195, 198-199, which provided for removal to federal courts for common law suits of assumpsit against the collectors of customs for overassessments. See Elliott v. Swarthout, 35 U.S. (10 Pet.) 137 (1836). The South Carolina Ordinance of Nullification, 1 Stat. (S.C.) 329 (Nov. 24, 1832), required the courts of that state to resist enforcement of the Federal Tariff Act of July 14, 1832. Rather than confer absolute immunity on officers in response to South Carolina, Congress instead provided for removal to a federal court. See Act of March 2, 1833, 4 Stat. 632, 633-34 (current version at 28 U.S.C. § 1442a (1976)). Congress again chose removal rather than immunity even when nullification became secession. Act of March 3, 1863, Ch. 81, § 5, 12 Stat. 756-57, as amended, Act of May 11, 1866, Ch. 80, §§ 3-4, 14 Stat. 46. Removal protection was later extended to members of the armed forces. Act of August 29, 1916, § 3, Art. 117, 39 Stat. 619, 669.

the President of the United States.[24/]

Wilkes I and II were decided in 1849 and 1851, respectively. Congress was aware of the holding of these cases that military officers were not absolutely immune from suits by servicemen. Yet it let these cases stand and, in acting 12 years later to protect military officers from suit, it declined to grant them absolute immunity but instead

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24/ See, e.g., Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (commander of warship answerable in damages to any person injured even though commander was simply obeying orders from President); Bates v. Clark, 95 U.S. (5 Otto) 204, 209 (1877) (military officer is liable in peacetime in trespass action despite fact that officer acted in good faith upon orders of superior).

provided them with an "obedience to orders" defense.[25/]

To this day, Congress has only once exercised its power and granted absolute immunity to military personnel -- to medical officers. 10 U.S.C. § 1089 (1979). See Howell v. United States, 489 F. Supp. 147 (W.D. Tenn. 1980); Hernandez v. Koch, 443 F. Supp. 347 (D.D.C. 1978). That Congress saw fit to single out medical personnel in the armed forces and provide them with absolute immunity indicates that it acknowledged

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25/ It was only during the Civil War that Congress provided officers with a defense when their actions were pursuant to an order issued by the President or Secretary of War. Act of March 3, 1863, ch. 81, § 4, 12 Stat. 755, 756 (1863). This defense "expired by its own limitation." The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 254 (1867). Only the protection of removal to federal court remained. The need for discipline in the military was equally important during the Civil War, and, before that, when the country was still a fledging, young nation. Yet Congress refrained from granting absolute immunity even during the most tumultuous of times.

both the continuing validity and wisdom of the Wilkes rule. This Court should not disturb Congress's judgment.

B. Military Officers Are Entitled to Only Qualified Immunity Under Harlow v. Fitzgerald

Twice in recent years the Court has considered and rejected the plea of executive officials that absolute immunity is critical to their ability to exercise discretion and to act decisively. Harlow, 73 L.Ed.2d at 407; Butz v. Economou, 438 U.S. 478, 506 (1978). In each instance, the Court adopted a doctrine of qualified immunity, reasoning that it was critical: (1) to deter the officers from committing constitutional wrongs, Harlow, 73 L.Ed.2d at 404, 411; Butz, 438 U.S. at 505; (2) to provide redress to the injured party, Harlow, 73 L. Ed. 2d at 407-08, 411; Butz, 438 U.S.

at 505; and (3) to avoid "draw[ing] a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." Harlow, 73 L. Ed. 2d at 404 (quoting Butz, 438 U.S. at 504).[26/] Most important, the Court emphasized that, "[f]or executive officials in general, ... our cases make plain that qualified immunity represents the norm." Id. at 403.

To be entitled to such an extraordinary defense, the defendant

> must show that the responsibilities of his office embraced a function so sensitive as to require a total shield from liability. He then must demonstrate that he was discharging the

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26/ See Scheuer v. Rhodes, 416 U.S. 232 (1974) (state military officials have only qualified immunity in § 1983 actions).

> protected function when performing the act for which liability is asserted.

Id. at 407 (footnotes omitted).

The government's argument that the officers's functions are specially protected because they involve military functions is without support. Harlow itself involved a suit by an employee of the Department of the Air Force against senior aides and advisors of the President of the United States. Those officials were not entitled to absolute immunity despite their high level status, the fact that the plaintiff was an Air Force employee, and the national security concerns that informed their conduct.

Absolute immunity for special functions have been limited to legislative functions, see Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), judicial functions, see Stump v. Sparkman, 435 U.S. 349

(1978), adjudicative functions, Butz, 438 U.S. at 513-517, and the function of the President of the United States. See Nixon v. Fitzgerald, ___ U.S. ___, 73 L. Ed. 2d 349 (1982). As in Harlow, none of these special functions is present in this case.[27/] While the government would have the Court create a new military function exception, it fails to identify either the historical or constitutional foundation that must support such a departure.

Any grant of absolute immunity must be premised on

> considerations of public policy, the importance of which should be confirmed either by reference to the common law

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27/ Although the government would like to raise the spectre of rebellion in the trenches and in the midst of battle, that has nothing to do with this case. Whether military decisions made in combat or wartime constitute a "special function" is not at issue here. These acts of race discrimination occurred in a non-combat peacetime situation.

> or, more likely, our constitutional heritage or structure.

Harlow, 73 L.Ed.2d at 407 n.20. In each case where the Court found absolute immunity, it identified either a common law antecedent or a basis in constitutional text or structure.[28/] Neither of these bases exist here.

Common law precedent counsels strongly against the extension of an absolute immunity to military officers. Cf. Pierson v. Ray, 386 U.S. 547, 555(1967)(police officers receive only qualified immunity as at common law). The common law explicitly refused to

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28/ See, e.g., Nixon v. Fitzgerald, ___ U.S. ___, 73 L.Ed.2d 349, 362-64 (1982) (President's immunity rooted in "constitutional heritage and structure" and is based on his "unique position in the constitutional scheme"); Imbler v. Pachtman, 424 U.S. 409, 422-23 (1976) ("common-law immunity of a prosecutor"); Gravel v. United States, 408 U.S. 606 (1972) (Speech and Debate Clause); Pierson v. Ray, 386 U.S. 547 (1967) (§ 1983 does not abrogate common law absolute immunity of judges).

give superior military officers absolute immunity from damage suits by servicemen. Wilkes I, 48 U.S. at 89; Wilkes II, 53 U.S. at 390.

In Wilkes, the commander refused to release a sailor upon expiration of his term of service and disciplined him when he refused to serve. Notwithstanding the officer's acquittal at court-martial, the Court permitted the sailor to sue his commanding officer for assault and battery, false imprisonment and cruel and unusual punishment in violation of the eighth amendment. The Court recognized the importance of vindicating the officer's authority. Nonetheless, it noted that

> the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice.

Wilkes II, 53 U.S. at 403. The commander

was therefore afforded only the then-prevailing version of qualified immunity. Id. at 404. There is thus no common law antecedent which would support absolute intra-military immunity.29/

In sum, there is no common law confirmation for the public policy arguments advanced by the government. Whether read as precedent directly on point or as the common law antecedent to this case, Wilkes supports the application of the general rule of qualified immunity.

29/ Only recently, in the Butz decision, this Court emphasized that Wilkes had not been overruled and ultimately used it as a basis for denying absolute immunity to federal officers. 438 U.S. at 493 n.18, 494. See also Feres v. United States, 340 U.S. 135, 141-42 n.10 (1950). The government argues that Feres should persuade the Court to extend the absolute immunity granted to the government in that case to the officers in this case. But Feres had a strong foundation in the common law doctrine of sovereign immunity. There is no common law antecedent of absolute immunity for officers.

Nor is there any support for the government's alleged public policy concerns in the "constitutional heritage or structure." Harlow, 73 L.Ed.2d at 407 n.20. See Points I.A. and II.A., supra. Rather, everything in the constitutional text, congressional practice, and the decisions of this Court establish that military officers are governed by the Constitution, civilian authority, and the courts.

Absent confirmation from either source, the government nevertheless advances public policy concerns which, it claims, justify absolute immunity. It argues that the possibility of damage suits will (1) encourage servicemen to disobey orders and (2) have a chilling effect on an officer's ability to act and give orders without hesitation. But, allowing civilian courts to

entertain damage actions will not undermine military discipline. To the extent damage actions implicate discipline concerns at all, they presuppose obedience to orders. Even if the existence of a damage remedy could strain the relationship between officer and soldier, the existence of any effective remedy, would have that same effect.[30/] But, it is questionable whether a decline in morale or discipline could ever be traced to the existence of a remedy. It would strain credulity to believe that a well-disciplined military unit with high morale would suddenly disintegrate or become disaffected merely because a remedy for serious injustice is created.

30/ See discussion, infra, at 54 n.37.

Disaffection and disobedience are more likely to result from the perpetuation of serious injustice such as racial discrimination than from the existence of a particular remedy.[31/] A graphic example is provided by the experience of black sailors during World War II. In March of 1944, Secretary of the Navy Forrestal appointed Lester B. Granger as his civilian aide on racial matters. In that capacity, he toured some 67 naval facilities at home and in the Pacific.

31/ As one authority observed:

> Discipline, order, and routine are essentials to a military organization. Civilians from a democratic society, even an imperfectly democratic society, willingly submit themselves to such authoritarian direction only when they believe in the purpose and fairness of the system.

Reddick, The Negro in the Navy in World War II, 32 J. of Negro Hist. 201, 209 (1947).

Granger, Racial Democracy -- The Navy Way, 7 Common Ground 61, 64 (1947). He reported that "morale and the performance of the Negro servicemen compared favorably with that of whites except where rank discrimination existed or was believed to exist."[32/]

Most notable was the reaction of a battalion of black Seabees, well known for their meritorious performance of duty, to wrongful treatment at the hands of their commander:

> Charging unfair and racially discriminatory treatment by the white commanding officer, they ... went on a hunger strike that lasted several days.... The strike ended with the [transfer] of the commanding officer in question, and the battalion was shortly shipped back overseas to Okinawa to resume meritorious performance.

Granger, supra, 7 Common Ground at 63.

32/ Reddick, supra, at 215.

Nor will allowing damage actions "chill" the officer's ability to give orders without hesitation. In Harlow, the Court dropped the subjective "malice" element of the good faith defense and expanded the qualified immunity defense so that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 73 L.Ed.2d at 410.[33/]

33/ The government's other argument, the fear of insubstantial or frivolous lawsuits, see Brief for Petitioners at 23-24; Brief of Amicus Curiae the Washington Legal Foundation at 12, is unfounded because the Court modified the qualified immunity standard in Harlow to meet exactly that concern. 73 L.Ed.2d at 409-11. Thus, insubstantial lawsuits not involving clear constitutional violations are to be dealt with on summary judgment on the immunity issue before discovery is allowed. Id. at 411.

[footnote continued]

Officers will be free to act except in derogation of clear-cut constitutional rights. The government quotes Orloff v. Willoughby, 345 U.S. 83, 94 (1953), entirely out of context for the proposition that "[d]iscrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others to soft spots." Brief for Petitioners at 25. Orloff was not sanctioning racial discrimination in the army. The government implies that blacks could, without civil relief, be assigned to all "the dangerous missions," and whites to the "soft

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[footnote continued]

This also dispels the government's floodgates argument. See Brief for Petitioners at 26. While the nature of military life may inevitably give rise to tensions and unfairness, it is only claims of violations of clearly established rights -- not complaints ingeniously translated into constitutional claims, Brief for Petitioners at 23-24 -- that will survive a motion to dismiss.

spots," because that is part of the "extra-ordinary demands that military life, in all its aspects, places on servicemen." Id. at 25. Although there are special obedience demands on servicemen, those demands do not require or suggest that orders given on the basis of race in violation of the fifth amendment should not be subject to relief in a civil court. The Harlow defense gives military officers adequate protection where they are entitled to it; it also properly denies them sanction for unconstitutional racial discrimination.

III.

ENLISTED MEN HAVE A BIVENS ACTION AGAINST THEIR SUPERIOR OFFICERS FOR ACTS OF RACIAL DISCRIMINATION

A. The Court Has Already Established a Bivens Cause of Action for Discrimination in Violation of the Equal Protection Component of the Due Process Clause

> In a number of closely related contexts, this Court has already settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right.

Davis v. Passman, 442 U.S. 228, 242 (1979) (citing Bolling v. Sharpe, 347 U.S. 497 (1954)). See also Davis, 442 U.S. at 234 and cases cited therein.

The Court, moreover, has already acknowledged that service members have a cause of action against their superiors for

discrimination in violations of the fifth amendment. In Frontiero v. Richardson, 411 U.S. 677 (1973), United States Air Force Lieutenant Sharron Frontiero sued the Secretary of Defense for sex discrimination in the disbursement of statutory benefits for dependents. Thus, a service member has a constitutionally protected right to be free of discrimination and he has a cause of action against his superiors to effectuate that right. Under Wilkes, he can also sue for damages.[34/]

Under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), and its progeny, there is a presumption that the victim has an action for damages against a federal officer for the violation of a

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34/ As discussed supra, at pp. 35-36, Wilkes involved a claim for damages for the violation of the serviceman's rights under the eighth amendment.

constitutional right. Davis, 442 U.S. at 242, 245; Carlson v. Green, 446 U.S. 14, 18 (1980). This cause of action may be defeated in a particular situation only if (1) there are "special factors counselling hesitation in the absence of affirmative action by Congress," Bivens, 403 U.S. at 396; Davis, 442 U.S. at 245; Carlson, 446 U.S. at 18, or (2) defendants show that "Congress has provided an alternative remedy which is explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." Carlson, 446 U.S. at 18-19, (citing Bivens, 403 U.S. at 397) (emphasis added); Davis, 442 U.S. at 245-247. As we show below, none of these factors exists in this case.

B. There are no Special Factors Counseling Hesitation

In Davis, the Court rejected the congressman's "independent status in our constitutional scheme," Carlson, 446 U.S. at 19, and his immunity under the Speech and Debate Clause as special factors counselling hesitation. Davis, 442 U.S. at 246. In Carlson, it rejected the fact that "requiring [prison officials] to defend respondent's suit might inhibit their efforts to perform their official duties," id., 446 U.S. at 19, as a special factor. In each case, it held that the available immunity adequately protected those concerns.

The case for finding a special factor here is even weaker than in Carlson or Davis. In Carlson, the Court found that the Butz qualified immunity was enough to protect the prison officer from any hesitation

in performing his duty. 446 U.S. at 219.[35/] Since then, however, the Court has significantly strengthened that defense; officers would be protected even for malicious actions not in derogation of established constitutional rights. See Harlow, 73 L. Ed. 2d at 409-10. In Davis, the potential defendant

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35/ It should be pointed out that every argument advanced by the government with respect to the need for discipline in the military has an analogue in the prison context that is at least equally strong.

> Prison life, and relations ... between the inmates and prison officials or staff, contains the ever present potential for violent confrontation or conflagration.

Jones v. North Carolina Labor Union, 433 U.S. 119, 132 (1977). "Guards and inmates exist in direct and intimate contact. Tension between them is unremitting." Wolff v. McDonald, 418 U.S. 539, 562 (1974). Compare Brief for Petitioners at 31. The danger of a breakdown of discipline in prisons is, if anything, greater than that in the military, and a great deal more imminent. Yet damage actions were allowed in Carlson.

had independent constitutional stature protected by an absolute immunity explicit in the constitutional text. Here, the military officer lacks any constitutional status that places him above the law and is, at most, entitled to a common law qualified immunity. See Wilkes I and II.

C. There is no Alternative Remedy That Congress has Explicity Declared is a Substitute

The statutory scheme for the armed forces does not provide an alternative remedy adequate to defeat the existence of a Bivens cause of action. Under Carlson, the test is whether

> Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective.

446 U.S. at 18-19 (emphasis added). The

military statutory scheme fails to satisfy this part of the Bivens test. The government does not even suggest that Congress has ever provided an alternative remedy which it explicitly declared to be a substitute for a Bivens remedy.

In Carlson, the prisoner could bring suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680. Nevertheless, the Court held that he had a Bivens action. It reasoned that there was no indication in the FTCA or its legislative history that Congress viewed the FTCA as an exclusive remedy. Rather, there was every indication that Congress considered the FTCA complementary to a Bivens remedy.[36/]

36/ It noted that when Congress has wanted to indicate that the FTCA is an exclusive remedy, it has done so. See, e.g., 38 U.S.C. § 4116(a), 42 U.S.C § 233(a), 42

(footnote continued)

Here, there is no legislative indication or history that the internal military procedures -- the Board for the Correction of Naval Records, 10 U.S.C. §1552(& Supp. V) ("the Board") and Article 138 of the Uniform Code of Military Justice 10 U.S.C. § 938 ("Article 138") -- were explicity or even implicitly intended by Congress to be exclusive substitutes for a Bivens remedy. Congress has had more than a full century since Wilkes I and II to declare that these two statutory schemes are exclusive, but has not done so.

(footnote continued)

U.S.C. § 2458(a), 10 U.S.C. § 1089(a), and 22 U.S.C. § 817(a) (malpractice by certain government health personnel); 28 U.S.C. § 2679(b) (operation of motor vehicles by federal employees); 42 U.S.C. § 2476(k) (manufacturers of swine flu vaccine).

D. There is no Equally Effective Remedy

None of the existing internal military procedures, either individually or collectively, are as effective as a Bivens remedy. There are four factors to consider when evaluating whether the "alternative remedy" is "equally effective:" (1) whether the remedy has a deterrent effect; (2) whether punitive damages are allowed; (3) whether the plantiff has a right to a jury trial; and (4) whether uniform federal law applies. Carlson, 446 U.S. at 20-23. The two procedures that the government relies on only meet the last test. Neither the Board procedures nor Article 138 provides punitive damages, a jury trial, or full compensatory damages.

While the Board may award back pay in some instances, 10 U.S.C. § 1552(c), it can

do nothing to compensate for the more serious injuries suffered. A back pay award does not compensate an individual for the loss of four years of his life spent scrubbing kitchen stoves or toilets with a toothbrush when, for example, he was denied the opportunity to receive engineering or computer training for racial reasons.

The Board procedures have no deterrent effect on officers. While the Article 138 procedure might,[37/] its failings are that it

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37/ While Article 138 may have a deterrent effect in theory, historically, it has not served this purpose with regard to race discrimination. In contrast, a civil damage action with compensatory and punitive damages will more surely deter misconduct. Of course, to the extent that Article 138 is an effective deterrent, a Bivens remedy will have no greater "chilling" effect upon discipline. In any event, Article 138 cannot be said to be as effective as a Bivens remedy in light of the other aspects of the Carlson test.

is solely an internal remedy and that it provides none of the damages available in a Bivens action.

The irony of this case is that the plaintiffs here do not even have the FTCA or other civil remedies normally available.[38/] They are in a worse position than the prisoner in Carlson. According to the government, enlisted men, who willingly joined the armed forces to serve this country honorably, would have fewer rights than federal

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38/ As the Government points out, Brief for Petitioners at 38 n.8, Title VII of the Civil Rights Act of 1964 does not cover the military. See Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), cert. denied, 439 U.S. 986 (1978). Thus, the plaintiff does not have Title VII as an alternative remedy. The fact that the military is not covered under Title VII does not affect the availability of a Bivens claim to servicemen. In Davis, a Bivens action was available to Ms. Davis even though employees of Congress were specifically exempted from Title VII.

prisoners who have broken the laws of our country. It would be a cruel step for this Court to declare that servicemen are entitled to less constitutional protection than prisoners.[39/]

CONCLUSION

Ignoring constitutional structure, congressional action, common law precedent, and recent case law, the government would have this Court legislate a new absolute immunity for military officers. The implications of such an immunity would be unprecedented. It would, for the first time,

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39/ The government's argument is short sighted. The effect of the rule it advocates will quickly filter through the ranks and affect efforts to recruit blacks into the Navy. But, then again, discouraging blacks is not a new approach for the Navy. See discussion, supra, 4-8, 9 n.9.

exempt the military from the constitutional process and leave servicemen without a realistic remedy for violations of clear-cut constitutional rights. And it would do so without enhancing military discipline or morale.

Adopting the broad Harlow immunity in the military context would, in contrast, provide sufficient protection for military needs while preserving the fundamental protections of the Constitution.

Accordingly, the judgment of the court of appeals should be affirmed.

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